No. 80-1423

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In the Supreme Court of the United States

OCTOBER TERM, 1980

JAN ALF ASSARSSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that the magistrate's determination that petitioner was properly "charged" by Sweden with extradictable offenses is not subject to habeas corpus review.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 635 F. 2d 1237. The district court's denial of the petition for a writ of habeas corpus was announced in open court (C.A. App. 179-188) and is not reported.[1] The magistrate's opinion in the underlying extradition proceeding (Pet. App. 1c-12c), as modified (Pet. App. 1d), is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 1980. A petition for rehearing was denied on December 23, 1980 (Pet. App. 1b). The petition for a writ of certiorari was filed on February 23, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] "C.A. App." refers to the Joint Appendix in the court of appeals.

STATEMENT

1. Petitioner, a subject of the Kingdom of Sweden, was admitted into the United States in 1960 as a permanent resident. Since then, he has conducted an import-export business that includes the purchase of merchandise for resale in European markets (Pet. 6). On March 5, 1976, a prosecutor in Malmo, Sweden petitioned the Swedish district court in Malmo to issue a "warrant of arrest" (Pet. App. 1f), alleging in support of the application that petitioner was "suspected on good grounds" of two counts of arson, one count of gross fraud, and two counts of attempted gross fraud. In response, Swedish District Court Judge Ake Roth, acting pursuant to Chapter 24, Section 1 of the Swedish Code of Judicial Procedure (C.A. App. 114), issued a "ruling" dated April 1, 1976, declaring petitioner arrested, forbidding the sale of his Swedish properties, and directing that "prosecution proceedings" commence no later than November 1, 1976 (Pet. App. 1g).[2]

2. On May 15, 1978, the United States filed a complaint in the United States District Court for the Northern District of Illinois seeking petitioner's extradition on behalf of the Government of Sweden (C.A. App. 13-15).[3] It alleged that petitioner had been "duly and legally charged in Sweden

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[2]In the subsequent extradition proceeding, the magistrate concluded (Pet. App. 3c) that Judge Roth's ruling constituted an "order of detention" as that term is used in the agreement on extradition entered into by Sweden and the United States (Convention on Extradition between the United States of America and Sweden, together with Related Protocol, Oct. 24, 1961, 14 U.S.T. 1845, T.I.A.S. No. 5496). That determination is not challenged here. The deadline fixed by Judge Roth for commencing prosecution has been extended periodically by Swedish court order and is now November 1, 1981 (Pet. App. 4a; Pet. 6).

[3]A prior extradition complaint, filed June 30, 1977, was dismissed for reasons not here relevant. A copy of the Convention on Extradition between the United States of America and Sweden of Oct. 24, 1961 (the "Extradition Treaty") is reprinted as Appendix E to the petition (Pet. App. 1e-12e).

with having committed the crimes of arson, fraud and attempted fraud" and that Sweden, through appropriate diplomatic channels, had demanded petitioner's surrender in order that he stand trial (C.A. App. 13, 14). In response to petitioner's motion to dismiss the extradition proceedings on the ground, *inter alia*, that petitioner was neither formally charged with nor convicted of a crime in Sweden, a United States magistrate held an extensive evidentiary hearing pursuant to 18 U.S.C. 3184 (Pet. App. 3a-4a, 14a). On October 20, 1978, the magistrate denied petitioner's claims and ordered that he be detained pending his surrender to Swedish authorities (Pet. App. 1c-12c). In so ruling, the magistrate explicitly rejected petitioner's claim that he was "merely suspected of a crime" (Pet. App. 4c) and concluded that the order of detention was evidence that "charges under the terms of the treaty" are currently pending against petitioner in Sweden (Pet. App. 4c, 11c, 1d).[4]

3. Petitioner then commenced this habeas corpus proceeding. The district court denied the writ, affirmed the magistrate's determination that petitioner was "charged" as that term is used in the treaty, and stayed petitioner's surrender pending appeal (C.A. App. 179). On appeal, the Seventh Circuit held (Pet. App. 1a-19a) that the magistrate's determination is not within the scope of habeas corpus review as defined by *Fernandez* v. *Phillips*, 268 U.S. 311 (1925). The court of appeals, therefore, did not reach the merits of petitioner's claim (Pet. App. 14a).

ARGUMENT

Petitioner argues (Pet. 9-15) that the court of appeals erred in holding that the magistrate's determination that petitioner was "charged" with offenses in Sweden is not

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[4]In denying petitioner's motion for reconsideration, the magistrate modified his order of October 20, 1978, to make explicit his determination that the charges pending against petitioner in Sweden were "charges" within the meaning of the extradition treaty (Pet. App. 1d).

subject to review. In particular, petitioner claims that the magistrate's finding constituted an improper assumption of jurisdiction, and that the court of appeals' ruling is in conflict with decisions of this Court and will generate confusion in the administration of treaties. We disagree.

1. We note at the outset that extradition rulings are not directly appealable. Review is available, if at all, by writ of habeas corpus. *Collins* v. *Miller*, 252 U.S. 364, 369 (1920). As this Court explained years ago in *Fernandez* v. *Phillips*, 268 U.S. 311, 312 (1925):

> [The writ] is not a means for rehearing what the magistrate already has decided. The alleged fugitive from justice has had his hearing and *habeas corpus* is available only to inquire whether the magistrate had jurisdiction, whether the offence charged is within the treaty and, by a somewhat liberal extension, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty.

Petitioner attempts to fit within the *Fernandez* test by urging that before taking jurisdiction in an extradition proceeding, a magistrate or judge must find that there is a "charge" against the person to be extradited. This "jurisdictional" issue, argues petitioner, is reviewable on habeas corpus. In our view, petitioner's theory founders because it misapprehends the nature of subject matter jurisdiction in an extradition context. Whether petitioner was charged in Sweden is not a basis for jurisdiction; it is simply one of the issues that a magistrate already having jurisdiction[5] must address to determine whether the proceedings instituted against the requested party have complied with the terms of

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[5]Petitioner does not now challenge the magistrate's authority to conduct the extradition hearing at which the disputed finding was made nor does he contend that the magistrate lacked jurisdiction over his person. Thus, it is not disputed that the magistrate had jurisdiction to consider the petition for extradition.

the extradition treaty. See *Garcia-Guillern* v. *United States*, 450 F. 2d 1189, 1192-1193 n.1 (5th Cir. 1971), cert. denied, 405 U.S. 989 (1972); *Freedman* v. *United States*, 437 F. Supp. 1252, 1258 (N.D. Ga. 1977). Petitioner has simply labelled as "jurisdictional" a finding on the merits with which he is unsatisfied. That characterization of the magistrate's finding cannot be employed as a means of broadening habeas corpus review.

Contrary to petitioner's suggestion (Pet. 10), the lower court's refusal to entertain his claim does not mean that a "person merely suspected of * * * criminal activity" may be extradited. For as the court of appeals observed (Pet. App. 13a), the extradition treaty with Sweden "plainly provides that the sufficiency of the evidence underlying the extradition is to be judged by American law," and that "probable cause is necessary to extradite." In the instant case, the magistrate, "[a]fter reviewing the Exhibits and testimony of record and carefully scrutinizing all the evidence of criminality and placing appropriate weight on each relevant item and further realizing that the consequences of an unjust extradition are very serious" (Pet. App. 11c), found that "there is * * * probable cause to believe that there have been [specified] violations of the criminal code of Sweden * * * committed by" petitioner (*ibid.*). And the court of appeals, even though it properly declined to entertain petitioner's appeal insofar as it challenged the magistrate's finding that Swedish charges had been filed, did consider petitioner's claim that the evidence against him was insufficient to justify extradition. See *Fernandez* v. *Phillips*, *supra*, 268 U.S. at 312. The rejection of that claim by both courts below is clearly correct.[6]

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[6]Moreover, a cursory examination of Swedish law suggests that the showing required to obtain an order of detention in Sweden would be sufficient in the United States to obtain a warrant of arrest. Although

The decision below is justified by policy considerations as well. As the court of appeals observed (Pet. App. 14a; citation omitted):

> The court's refusal to review compliance with foreign criminal procedure is not a formalistic application of outmoded law. Rather, the narrow scope of review is based on respect for the sovereignty of other nations. While our courts should guarantee that all persons on our soil receive due process under our laws, that power does not extend to overseeing the criminal justice system of other countries. This respect is embodied in the procedural framework of international extradition, which "gives to the demanding country advantages most uncommon to ordinary civil and criminal litigation."
>
> We are also not expected to become experts in the law of foreign nations. * * * The treatment of this case below demonstrates the dangers inherent in determining the applicability of foreign law. The magistrate

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there are no exact parallels between Swedish and American criminal procedure, it is clear that in Sweden an order of detention cannot be obtained on "mere suspicion" as petitioner suggests. In fact, it appears from Chapter 24, Section 1 of the Swedish Code of Judicial Procedure (C.A. App. 114) that Sweden requires a greater showing than would be demanded by federal or Illinois law. The Swedish Code requires not only a showing of probable cause before an order of detention can be issued, but also proof that the offense is punishable by a year or more of imprisonment and that absent detention, "it reasonably can be expected" that the accused will flee, obstruct justice, or continue his criminal activity (*ibid.*). While the Swedish Code uses the words "suspected on probable cause," there is no reason to assume the phrase differs from "probable cause to believe" (Fed. R. Crim. P. 4) or "reasonable grounds to believe" (Ill. Rev. Stat. ch. 38, § 107-2(c) (1980)). Furthermore, a person arrested under Chapter 24 must be produced before an examining magistrate or released (C.A. App. 117-119).

held an extensive hearing, complete with experts, exhibits, and much other evidence, to try to determine whether there was compliance with Swedish law. We often have difficulty discerning the laws of neighboring States, which operate under the same legal system as we do; the chance of error is much greater when we try to construe the law of a country whose legal system is much different from our own. The possibility of error warns us to be even more cautious of expanding judicial power over extradition matters.

2. Even if the magistrate's finding were reviewable, petitioner's claim that he was not "charged" within the meaning of the extradition treaty lacks support. This Court has consistently held that extradition treaties are to be construed liberally.[7] As the Court wrote in *Factor* v. *Laubenheimer*, 290 U.S. 276, 293-294 (1933):

> In choosing between conflicting interpretations of a treaty obligation, a narrow and restricted construction is to be avoided as not consonant with the principles deemed controlling in the interpretation of international agreements * * *. [I]f a treaty fairly admits of two constructions, one restricting the rights which may be claimed under it, and the other enlarging it, the more liberal construction is to be preferred.

Petitioner's interpretation of the term "charged" as used in Article I of the extradition treaty would render meaningless a substantial portion of Article XI. Article I (Pet. App. 1e) sets out the general obligation of each contracting state

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[7]See, *e.g.*, *Valentine* v. *United States*, 299 U.S. 5, 10 (1936); *Factor* v. *Laubenheimer*, 290 U.S. 276, 293 (1933); *Jordan* v. *Tashiro*, 278 U.S. 123, 127 (1928); *Grin* v. *Shine*, 187 U.S. 181, 184-185 (1902); *Tucker* v. *Alexandroff*, 183 U.S. 424, 437 (1902); *Rice* v. *Ames*, 180 U.S. 371, 374 (1901); *In re Ross*, 140 U.S. 453, 475 (1891); *Geofroy* v. *Riggs*, 133 U.S. 258, 271 (1890).

to surrender to the other "those persons found in its territory who have been charged with or convicted of any of the offenses specified in Article II * * *." Article XI (Pet. App. 7e-8e) prescribes the documents required to support an extradition request. If the requested party has been convicted of an offense, a copy of the final sentence is required; for those "merely charged with [an] offense," a copy of the arrest warrant "or other order of detention" must be provided (Pet. App. 7e).

Thus, the contracting parties obviously contemplated that individuals for whom an order of detention had issued would be within the reach of the extradition treaty. Nevertheless, petitioner argues that a detention order is not sufficient proof that a "charge," as that term is used in Article I, has been lodged. That is plainly incorrect, for as the court of appeals noted (Pet. App. 12a), "[i]f the parties had wished to include the additional requirement that a formal document called a charge be produced, they could have so provided. * * * Since the parties chose not to require production of the charge document, we can easily infer that they did not require the 'substance' of a charge either." Instead, the treaty was tailored to accommodate Sweden's criminal procedure, which provides two mechanisms for detaining a person when there is probable cause to believe he has committed a crime: an arrest warrant and a detention order.[8] As the magistrate correctly held (Pet. App. 4c), when either of these documents has issued, the person named in it has been "charged" within the meaning of the extradition treaty. And

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[8]In the instant case, for some reason the prosecutor styled his petition an "Application for a Detention Order" but requested that "a warrant of arrest" issue (Pet. App. 1f). In response, the Swedish district court issued a "ruling" in which petitioner was "declare[d] * * * arrested." That ruling has been treated throughout this proceeding (and the underlying extradition proceeding) as a detention order. See note 2, *supra*.

as the court of appeals observed (Pet. App. 10a-11a; footnote omitted), "[t]he word 'charge' is * * * used [in Article I of the treaty] in contrast to 'convicted'; that is, persons convicted or charged with certain crimes may be extradited. The term is used in the generic sense only to indicate 'accused.' * * * [Petitioner's] argument converts the treaty's language that individuals be 'charged,' a verb, into a requirement that 'charges,' a noun, be filed. It is based on semantics, not substance."[9] Thus, the claim that petitioner improperly seeks to raise by way of habeas corpus is, in any event, meritless.[10]

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[9]Although petitioner decries the absence of a formal "charge," the Swedish Code of Judicial Procedure refers to the document by which public prosecutions are commenced as a "summons" (C.A. App. 122-124, 126). It thus follows, semantically at least, that if the contracting parties had wished to limit extradition to persons who have been convicted or have had prosecutions formally commenced against them, they would have used the verb "summoned" rather than the verb "charged."

[10]Despite petitioner's contrary assertions (Pet. 9-11), the decision below is not inconsistent with any decision of this Court. In *United States* v. *Patterson*, 150 U.S. 65 (1893), a circuit court commissioner sought payment for services rendered in hearing the testimony of a complaining witness and deciding whether a warrant should issue. Whether his claim had merit turned on the construction of a statute authorizing payment for "hearing and deciding on criminal charges." In concluding that for purposes of that statute "[a] criminal charge * * * exists only when a formal written complaint has been made against the accused and a prosecution initiated" (*id.* at 68), the Court could hardly have been defining the term "charge" for every purpose and in every context, and most especially was not construing the terms of a treaty entered into 68 years later. The other case upon which petitioner relies, *Maximov* v. *United States*, 373 U.S. 49 (1963), does not bear even a surface resemblance to the instant case; moreover, the proposition petitioner extracts from it — that courts should give effect to the "obvious meaning" of a treaty when to do so is not inconsistent with the intent of the parties to it (Pet. 9)—is, while unexceptionable, not relevant here where both the plain meeting of the treaty and the intent of its signatories dictate a result adverse to petitioner's interest.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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